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IN THE

Supreme Court of the United States

October Term, 1962.

No. 400

LAWRENCE W. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
ATOMIC ENERGY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, LAWRENCE W. GOLDBERG, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 5, 1962.

CITATIONS TO OPINIONS BELOW.

The Memorandum Order of the late Circuit Judge Herbert J. Goodrich is unreported and is printed in appendix B hereto, *infra* p. 12.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 5, 1962; p. 12, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Whether the Court has jurisdiction over a Petition to Review an Order of the Atomic Energy Commission granting a construction permit for a nuclear power reactor to a private utility company in combination with a group of private utility companies brought by an individual citizen and taxpayer who alleges he is a person aggrieved by such grant on grounds:

1. Danger to his life and health and other members of the public resident within seventy miles of the construction site;

2. Violation of the Antitrust laws of the United States.

STATUTES INVOLVED.

The statutory provisions involved are Section 7 of the Atomic Energy Act of 1954, 71 Stat. 579; 42 U. S. C. § 2239; Section 4 of the Judicial Review Act, 64 Stat. 1130; 5 U. S. C. 1034 and Section 10(a) of the Administrative Procedure Act; 60 Stat. 243, 5 U. S. C. 1009(a). They are printed in appendix A, *infra* pp. 9 and 10.

STATEMENT.

The Application of the Philadelphia Electric Company for the grant of a construction permit for a nuclear power reactor in combination with fifty-two other private utility companies was filed with the Commission on July 25, 1960. In August 1961, Philadelphia Electric Company submitted a revised report at the request of the Commission whereupon the Commission issued a notice of hearing on November 8, 1961, published in the Federal Register on November 16, 1961 (26 F. R. 10736). One of the issues to be considered in that hearing was whether the construction of the type proposed at the proposed location could be operated and constructed without undue risk to the health and safety of the public, and whether the construction of the reactor would be inimical to the common defense and security or the health and safety of the public. Petitioner, a taxpayer and member of the public resident within seventy miles of the proposed construction site was sent a copy of the notice of hearing on November 28, 1961 in response to his previous request. Petitioner wrote the Commission to ask how he might intervene in the said hearing. On December 5, 1961 in a letter from an attorney for the Atomic Energy Commission Regulatory Staff, Petitioner was informed that he might file a Petition to Intervene in the proceedings pursuant to Section 2.705 of the Commission's Rules of Practice (10 C. F. R. part 2) or, in the alternative, enter a limited appearance pursuant to Section 2.731. Petitioner received a copy of the Commission's Rules of Practice with this letter.

Unrepresented by legal counsel, Petitioner appeared at the public hearing on December 18, 1961. At his request he was granted permission to make a limited appearance for the sole purpose of making an oral statement pursuant to Section 2.731 of the Commission's Rules of Practice. The Hearing Examiner who presided informed Petitioner

he might petition for leave to intervene as a party but did not explain the legal consequences of the choice involved. Petitioner's statement declared that the Atomic Energy Act of 1954 was unconstitutional as administered by the Commission in that it involved subsidization of one sector of the economy at the expense of others. It declared that it was the intent of Congress to establish a nuclear energy program under direction of the Federal Government involving broad participation and a wide dissemination of the knowledge derived from such a program, rather than merely providing federal funds for the development of Atomic Energy by private interests.

On February 2, 1962, the Hearing Examiner, as presiding officer issued an initial decision directing the issuance of the construction permit for the construction of the reactor, providing that in accordance with Sections 2.751 and 2.752 of the Commission's Rules of Practice a Petition to Review the decision could be filed within twenty days after the date of the initial decision, or on or before February 23, 1962; that if no such Petition were granted by the Commission, the decision would become final on March 5, 1962.

Under Sections 2.700 and 2.703 of the Commission's Rules of Practice, on February 23, 1962, Petitioner through an attorney retained on that date, sent a telegram to the Commission requesting a review of the initial decision by the Commission so that Petitioner might present testimony on the issue of whether the reactor would be inimical to the common defense and security or to the health and safety of the public, as well as raising constitutional and legal questions in connection with the issuance of the construction permit, and asking leave for Petitioner to intervene in the proceedings as a member of the public affected by the issuance of the construction permit. This Petition was denied in a Memorandum and Order by the Commission dated March 1, 1962 on the ground that his motion was not timely and that he did not explain his delay in moving

for leave to intervene in the proceedings for the purpose of presenting testimony.

On April 27, 1962, Petitioner filed with the Court of Appeals for the Third Circuit a Petition to Review and Set Aside the Order of the Commission, and a Motion for Stay pending determination of the Petition for Review.

After submission of Briefs on behalf of Petitioner and the Atomic Energy Commission, on May 7, 1962 the Motion of Philadelphia Electric Company to appear as a party was granted by the Court and Briefs were submitted by the Company. Argument on the Briefs took place on May 7, 1962 and on May 8, 1962, Petitioner's Motion for Stay was denied. Thereupon, the Atomic Energy Commission filed a Motion to Dismiss the Petition for Review on the ground that Petitioner was not a party aggrieved by the Order granting a construction permit and that he had suffered no legal wrong by that Order and had no standing to maintain the Petition to Review. The Philadelphia Electric Company also filed a Motion to Dismiss the Petition for Review on May 25, 1962. Memorandums were filed on behalf of the Atomic Energy Commission, Philadelphia Electric Company in favor of the Motion to Dismiss and by Petitioner against the Respondent's Motion to Dismiss. Argument on the Motion to Dismiss was taken by the Court on June 4, 1962 and an Order was made on June 5, 1962 that the Petition for Review be dismissed for lack of jurisdiction.

On July 16, 1962, Petitioner sent to the Court of Appeals and to all the parties concerned and their counsel a notification of intention to file the instant Petition for Certiorari.

REASONS FOR GRANTING THE WRIT.

1. The standing of a member of the public to obtain judicial review of the grant of a construction permit for a nuclear power reactor is an important and novel question of jurisdiction involving the Atomic Energy Act of 1954, the Judicial Review Act and the Administrative Procedure Act. It has not been decided in this Court. The issue was met as to national and international labor unions, some of their members and families, who were held to be parties aggrieved by issuance of a construction permit with standing to seek review of the order where they claimed the permit would result in construction of a reactor inherently unsafe under present technological conditions and thereby a physical danger to the unions involved, some of their members and families. *International Union of Electrical Radio and Machine Workers, AFL-CIO v. U. S.*, 280 F. 2d 645 (1960), 108 U. S. App. D. C. 97; cert. den., 81 S. Ct. 221, 364 U. S. 889, 5 L. Ed. 186, reversed on other grounds, 81 S. Ct. 1529, 367 U. S. 396, 6 L. Ed. 2d 924. Petitioner here similarly bases his claim of jurisdiction on the threatened danger to him as a member of the public living within the area affected as to health and safety by the grant of the permit. He also claims grievance by virtue of the alleged violation of the antitrust laws.

If the public interest is involved in threatened physical injury so as to confer standing for review on labor unions and their members acting as petitioners, as in the *International Union of Electrical Radio and Machine Workers* case, *supra*, then jurisdiction would seem to be present when an individual member of the public asserts the same injury as the ground of his grievance. Clearly, a resolution of this conflict in decisions by this Court would be in the public interest.

2. The decision of the Court below is in conflict with the decisions in this Court and in the Second Circuit wherein

one adversely affected in fact by an agency decision is allowed to challenge governmental action even though the rights asserted are not limited to the individual petitioner. See *F. C. C. v. Sanders Bros. Radio Station*, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940). Also, *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir.), dismissed as moot 320 U. S. 707, 64 S. Ct. 74, 88 L. Ed. 414 (1943); *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).[1]

Clarification of the conflict in cases involving the law of "standing" or jurisdiction to seek judicial review is of great importance to the public. Clearly, Congress in the Atomic Energy Act of 1954, the Judicial Review Act of 1950 and the Administrative Procedure Act intended to permit someone who had a direct injury threatened by administrative action to have standing to intervene in the action and to have jurisdiction to seek review of the action of the Commission involved.

3. The decision of the court below is believed to be erroneous and the conflicting decision of the Court of Appeals

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1. Administrative Law Treatise, Davis, Vol. 3, Section 22.18, p. 92 (1958):

> "The federal courts cannot justify their law of standing by saying that the 'case' or 'controversy' requirement of Article III of the Constitution requires the artificiality and the complexity. Nothing in the Constitution—except what the Supreme Court has put there—requires a departure from the simple and natural proposition that one who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable. Whenever a private party is in fact adversely affected, asserts that administrative action is illegal, and whenever the defendant in the proceeding asserts that the action is legal, the technical requirement of a 'controversy' is met. This is what the Supreme Court itself has held in the *Sanders* case. What is needed is a consistent application of the *Sanders* doctrine.
>
> "The doctrine of 'private attorney generals', as developed in the Second Circuit (*Associated Industries v. Ickes*, supra), permits an adversely affected party to assert the public interest in challenging administrative action, whenever a statute provides for challenge by one who is 'aggrieved', or 'adversely affected'."

for the District of Columbia in *International Union of Electrical, Radio and Machine Workers, supra*, correct. Also the cited decisions in the Second Circuit in *Associated Industries v. Ickes, supra*, and *Reade v. Ewing, supra*. The decision of the court below is also in conflict with the rationale of the decision of this Court in *F. C. C. v. Sanders Bros. Radio Station, supra*.

The theory of these conflicting decisions would support Petitioner's right to intervene as a party in the hearing before the Commission as a person whose interest might be affected by the proceedings under the Atomic Energy Act of 1954, Section 7, *supra;* his jurisdiction to seek review as a party aggrieved by the final order under the Judicial Review Act of 1950; and as a person suffering legal wrong because of the agency action and/or as one adversely affected or aggrieved by such action under Section 10(a) of the Administrative Procedure Act, *supra*.

It is a matter of great public interest to determine whether a member of the public residing within seventy miles of the construction site of a nuclear reactor who alleges the threat of direct physical injury in the event of any unforeseen development has standing to seek judicial review of the grant of such a construction permit. This question has not been decided by this Court, and we submit has been erroneously decided by the court below.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR HUGO WRIGHT,
MALCOLM W. BERKOWITZ,
Counsel for Petitioner.

August 29, 1962.

APPENDIX A.

Section 7, Atomic Energy Act of 1954, 71 Stat. 579; 42 U. S. C. § 2239:

"(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 2133 or 2134(b) of this title for a license for a testing facility. As amended Sept. 2, 1957, Publ. L. 85-256, § 7, 71 Stat. 579."

Section 4, Judicial Review Act of 1950, 64 Stat. 1130; 5 U.S. C. 1034:

"Any party aggrieved by a final order reviewable under this Act [§ 1031 et seq. of this title] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof [§ 1033 of this title] lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of the agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is

sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General (Dec. 29, 1950, c. 1189, § 4, 64 Stat. 1130)."

Section 10(a), Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009(a):

"(a) Right of review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,018.

LAWRENCE W. GOLDBERG

v.

UNITED STATES OF AMERICA,

ATOMIC ENERGY COMMISSION.

Present: McLAUGHLIN, STALEY and GANEY, *Circuit Judges.*

ORDER.

Petitioner's motion for a stay in this case is denied.

By THE COURT,

McLAUGHLIN,

Circuit Judge.

Dated: May 8, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,018.

LAWRENCE W. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
ATOMIC ENERGY COMMISSION,
Respondents.

PHILADELPHIA ELECTRIC COMPANY,
(PARTY IN INTEREST).

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

Upon consideration of the motions by respondents and by Philadelphia Electric Company to dismiss the petition for review in the above case, and of the briefs in support of the motions, and the brief of petitioner in opposition, and after hearing;

It is ORDERED that the petition for review be, and it is hereby dismissed for lack of jurisdiction.

By THE COURT,
GOODRICH,
Circuit Judge.

June 5, 1962.

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UNITED STATES OF AMERICA
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF PHILADELPHIA ELECTRIC COMPANY TO BE ADDED AS A PARTY RESPONDENT

and

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

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October 1, 1962

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 400

Lawrence W. Goldberg, Petitioner

v.

United States of America
Atomic Energy Commission,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF PHILADELPHIA ELECTRIC COMPANY TO BE ADDED AS A PARTY RESPONDENT

Philadelphia Electric Company hereby respectfully moves this Honorable Court for an order adding movant as a party respondent and amending the caption of this proceeding to show movant as a party respondent.

The petition herein is to review a judgment of the Court of Appeals for the Third Circuit dismissing a petition to review and set aside an order of the Atomic Energy Commission which granted to movant a construction permit for a nuclear power reactor, now under construction.

Movant was a party to the proceedings before the Court of Appeals and therein moved the court, as did respondents named herein, to dismiss the petition for review for lack of jurisdiction, raising the question of the

standing of petitioner to seek judicial review of the order of the Commission in question. Upon said motions the court below dismissed the petition for review for lack of jurisdiction.

Pursuant to Rule 21 of the Rules of this Court counsel for petitioner has notified movant as a respondent of the date of filing of the petition, the docket number of the case and the contents of the record filed, and, pursuant to Rule 33, has served copies of the petition upon movant as an adverse party.

Movant's name has been omitted from the caption of the petition and, as a result, movant may not be acknowledged as a party herein although as the holder of the construction permit and an actively participating party in the proceedings below movant has a vital interest in this proceeding.

Wherefore, for the foregoing reasons, movant respectfully requests that this Honorable Court issue an order correcting and amending the caption of this proceeding to show movant as a party respondent.

Respectfully submitted,

VINCENT P. MCDEVITT,
EUGENE J. BRADLEY,
Attorneys for Philadelphia Electric Company.

October 1, 1962.

BRIEF FOR
PHILADELPHIA ELECTRIC COMPANY
IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

QUESTION PRESENTED

Whether an order of the Atomic Energy Commission granting a reactor construction permit is judicially reviewable at the request of one not a party to the proceeding leading to such order who requests such review simply as a member of the public and without having alleged whether or in what manner he is aggrieved by such order.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the petition at pp. 9-10 except that the last sentence of subsection (a) of Section 189 (designated by petitioner as Section 7) of the Atomic Energy Act of 1954 should read as follows:

> "The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under Section 103 or 104b. for a license for a facility, and on any application under Section 104c. for a license for a testing facility."

The above sentence was added by P.L. 85-256, 71 Stat. 576.

STATEMENT.

On July 25, 1960 Philadelphia Electric Company filed with the Atomic Energy Commission an application for a construction permit for a nuclear power reactor. Upon due notice, a hearing on the application was held before a Hearing Examiner of the Commission on December 18, 1961.

Petitioner was present at the hearing and openly elected not to seek intervention as a party under the Commission's Rules of Practice, confining his activities to the reading of a statement. His statement made no reference to the safety of the reactor, to its location, to his remoteness from or proximity to it, or to any physical or economic injury to him which might result from its construction or operation. On the contrary, his statement was limited solely to comments on policy matters of a politico-economic nature relating to phases of the government's atomic energy program, with vague references to constitutionality (Transcript).

Some nine weeks after the close of the hearing, after the issuance of the initial decision authorizing the permit,

petitioner directed a telegraphic request to the Commission for leave to intervene as a party. Again, petitioner did not assert any threatened injury to him, economic or otherwise, from the construction or operation of the reactor, or assert that his interest would be affected by the proceeding (Exh. E). By order issued March 1, 1962, the Commission refused the request on the grounds that it was not timely, that it offered no explanation of petitioner's delay in seeking intervention, that it was made without notice to the parties and that it referred to petitioner only as a member of the public without any showing of such interest as would give him standing to intervene (Exh. F).

On April 27, 1962 petitioner filed with the United States Court of Appeals for the Third Circuit a petition to review the final order of the Commission directing the issuance of the construction permit, said order having become final on March 5, 1962. Again, the petition for review was utterly devoid of any claim, or any allegation to support a claim, that petitioner was or would be adversely affected or aggrieved, as a citizen, a taxpayer, or otherwise, by the order sought to be reviewed (Petition for Review).

Upon motion Philadelphia Electric Company was granted leave to appear as a party in the case. The Commission and Philadelphia Electric Company filed motions to dismiss the petition for review for the reason that petitioner was without standing to seek review. After hearing, the Court, on June 5, 1962 dismissed the petition for lack of jurisdiction[1] (Petition, p. 12).

[1] Petitioner also filed in the court below a motion to stay the construction permit and "all proceedings herein" pending determination of the petition for review. This motion was likewise utterly devoid of any showing as to how petitioner was aggrieved by the order sought to be reviewed, made no allegations of injury to the petitioner in the event a stay was denied, nor any other allegations to support the motion (Motion to Stay). The court, after hearing, denied the motion on May 8, 1962 (Petition, p. 11).

ARGUMENT.

I.

THE DECISION BELOW IS CORRECT.

Section 189 of the Atomic Energy Act of 1954, 68 Stat. 955, 42 U.S.C. § 2239, makes final orders of the Commission in proceedings for the granting of construction permits judicially reviewable in the manner prescribed by the Judicial Review Act, 64 Stat. 1129, 5 U.S.C. 1031 *et seq.* and subject also to Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009.

Section 4 of the Judicial Review Act provides for review of such orders at the instance of "any party aggrieved" (5 U.S.C. § 1034) and Section 10 of the Administrative Procedure Act provides for judicial review of agency action at the instance of any person "suffering legal wrong", or "adversely affected", or "aggrieved" by such action (5 U.S.C. § 1009).

The naked assertion, in a petition for judicial review of an agency order, that the petitioner is aggrieved by the order, without factual allegations to support such an assertion, is insufficient to confer standing to seek judicial review. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 219 F. 2d 729 (3d Cir. 1955), *cert. denied*, 349 U.S. 945. Petitioner having failed to assert that he was adversely affected or aggrieved by the order sought to be reviewed and having failed to make any factual allegations which would support a claim of aggrievement, the court below properly dismissed his petition for review.[2]

[2] *Some four weeks after the statutory period for filing a petition for review had expired*, petitioner's counsel, during the course of his oral argument in the court below on motions to dismiss the petition for review for lack of jurisdiction, *for the first time asserted hazard to the health and safety of petitioner as a basis for his standing to seek review*, no attempt being made to amend the petition for review to incorporate therein such unsupported arguments of counsel.

Absent any allegations to show that petitioner is aggrieved by the order in question, the petition for review was merely that of a member of the general public without such interest as is necessary to invoke judicial review. It is insufficient that his only interest in the matter is a desire that the laws be properly administered. *Railway Express Agency* v. *Kennedy*, 189 F. 2d 801, (7th Cir. 1951) *cert. denied* 342 U.S. 830.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner asserts a conflict between the decision of the court below and those of other federal courts of appeals and of this Honorable Court. The assertion is erroneous. In each case upon which petitioner relies standing to seek judicial review of agency action was predicated upon some specific and direct adverse effect of such action upon those seeking review: in *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943), order vacated, 320 U.S. 707, financial loss to the purchasers of millions of tons of coal resulting from an order increasing the minimum price of coal purchased in their area; in *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), adverse effect upon the health of a consumer of oleomargarine from an order allowing an allegedly unwholesome substance to be added to it; in *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, economic loss to the licensee of an existing radio station from an order authorizing a competitive station. And in *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *United States*, 108 App. D.C. 97, 280 F. 2d 645, reversed on other grounds, 367 U.S. 396, labor unions and members thereof who had intervened in a Commission construction permit proceeding *claiming that the operation of the reactor threatened them with specified economic and other injury* were held to have been aggrieved by the issuance of a permit to construct

the reactor, and thus to have standing to seek judicial review. In the instant case the record is devoid of any allegations by petitioner of a comparable nature which would render him adversely affected or aggrieved by the order sought to be reviewed.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The petition for review being devoid of any allegations that petitioner was aggrieved by the order sought to be reviewed, the question presented herein by petitioner (Petition, p. 2) does not arise in the record. The rule that a person who has not shown whether or in what manner he is adversely affected by an agency order lacks standing to seek judicial review thereof being well settled, there is no important question of federal law present herein.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

VINCENT P. MCDEVITT,
EUGENE J. BRADLEY,
Attorneys for Philadelphia Electric Company.

October 1, 1962.

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Section 2.705	4
Section 2.731	4

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 400

LAWRENCE GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA AND ATOMIC ENERGY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. 12) and the opinion and order of the Atomic Energy Commission (Ex. F)[1] are not yet reported.

JURISDICTION

The order of the court of appeals dismissing the proceedings was entered June 5, 1962, and the petition

[1] "Ex." refers to the exhibits filed by the respondents in the court of appeals. These exhibits were submitted with briefs opposing the motion to stay. The respondents filed an additional exhibit with their brief in support of the motion to dismiss the proceeding. This consists of an extract from the transcript of the Commission proceedings and will be referred to as "Tr."

for certiorari was filed September 4, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, identifying himself as a taxpayer and a citizen, sought judicial review of an order of the Atomic Energy Commission authorizing construction of a nuclear power reactor. The statutes allow judicial review of administrative action only at the instance of a person aggrieved or one suffering legal wrong because of that action. Respondents filed a motion to dismiss alleging that petitioner lacked the requisite standing to obtain judicial review.

The question presented is whether the court of appeals correctly determined that it did not have jurisdiction to review the Commission order.

STATUTES INVOLVED

Section 189, Atomic Energy Act of 1954, 71 Stat. 579, 42 U.S.C. 2239, provides in pertinent part:

> (a) * * * The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 2133 or 2134(b) of this title for a license for a facility, and on any application under section 2134(c) of this title for a license for a testing facility.
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> (b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in sections 1031–1042 of Title 5, and to the provisions of section 1009 of Title 5.

Section 4, Judicial Review Act of 1950, 64 Stat. 1130, 5 U.S.C. 1034, provides:

> Any party aggrieved by a final order reviewable under this Act [§ 1031 et seq. of this title] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof [§ 1033 of this title] lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of the agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. * * *

Section 10(a), Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(a), provides:

> (a) Right of review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

STATEMENT

On November 8, 1961, the Atomic Energy Commission published a notice of hearing on the application of Philadelphia Electric Company for a construction permit authorizing the company to construct a nuclear reactor at Peach Bottom, York County, Pennsylvania (Ex. A). Among the issues set for the hearing were (Ex. A, pp. 1, 2):

> 1. Whether the applicant has submitted sufficient information to provide a reasonable assurance that a utilization facility of the general type proposed in the application can be constructed and operated at the proposed location without undue risk to the health and safety of the public.
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> * * * * *
>
> 5. Whether the construction of the reactor will be inimical to the common defense and security or to the health and safety of the public.

Procedures for intervention in the proceeding were set out in the notice of hearing (Ex. A, p. 2).

A copy of this notice of hearing was mailed to the petitioner on November 28, 1961, at his request. In a letter dated December 5, 1961, counsel for the staff of the Atomic Energy Commission informed petitioner, in response to his query, that he might file a petition to intervene as a party in the proceeding pursuant to Section 2.705 of the Commission's Rules of Practice or, in the alternative, enter a limited appearance pursuant to Section 2.731.[2] A copy of the Commission's Rules of Practice was included with this letter.

A public hearing was held on December 18, 1961. Petitioner, a resident of Philadelphia, was present and stated that he wished to make a limited appearance in order to present an unsworn statement as provided by Section 2.731 of the Commission's rules.[3]

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[2] The Commission's Rules of Practice in effect at the time of the hearing are set forth in 10 C.F.R. Part 2.

[3] The Commonwealth of Pennsylvania, an intervenor, was represented at the hearing by counsel, who "expressed concern

Both the hearing examiner and counsel representing the Atomic Energy Commission explained to petitioner the choice between a limited appearance for the purpose of making a statement and formal intervention as a party. Petitioner stated that he did not want to intervene as a party, and he then read an unsworn statement which attacked the administration of the Atomic Energy Act as unconstitutional because, *inter alia*, "the Act as administered has been contrary to the best interests of the people of the United States, is inimical to the long range security of the United States, violates provisions of the Constitution providing for equal protection of the laws, * * * transcends the intent of Congress and fails to promote the general welfare as directed by the Constitution" (Tr. 6). He protested against the government's give away of atomic energy technology to the electric utilities (*id.* at 6, 7).

On February 2, 1962, the hearing examiner authorized issuance of a construction permit (Ex. B) and stated that, in accordance with the Commission's rules, a petition to review his initial decision might be filed within 20 days.

On February 23, 1962, petitioner, by telegram, submitted a petition to review the initial decision and to intervene as a party in the proceedings. Identifying himself as "a member of the public affected by the application for a construction permit," petitioner stated in the telegram that he wished to present testimony on the issue of the effect of the construction of this reactor on the "common defense and security

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about public health and safety considerations relating to the proposed facility". (Ex. B, p. 2).

[and] the health and safety of the public * * * as well as certain constitutional questions * * *" (Ex. E. p. 2). The Commission considered and denied the motion stating in its order that to allow intervention would constitute "an abuse of discretion" (Ex. F).[4] The initial decision became final on March 5, 1962.

Petitioner then filed a petition to review the decision and a motion to stay "all proceedings" pending the determination of the petition in the Court of Appeals for the Third Circuit. The petition for review contained no allegation of aggrievement. It asserted, *inter alia,* that the issuance of the permit to the applicant violated the antitrust laws because a combination of 52 utility companies with the applicant in a research and development corporation tends "towards a private monopoly"; that the issuance of the permit violates various provisions of the Atomic Energy Act and constitutes an "unlawful delegation of legislative authority"; and that the construction of the reactor "will be inimical to the common defense and security

[4] In so doing, the Commission noted that the motion to intervene was not timely and had not been served on the other parties to the proceeding, as required by the Commission's rules. On February 6, 1962, the applicant had moved to waive the 20 day waiting period in order that the initial decision might constitute the "final action" of the Commission and a construction permit issue (Ex. C). The Commonwealth of Pennsylvania and the applicant averred that they would not file petitions for review of the initial decision. By order dated February 21, 1962, the motion to waive the waiting period had been granted and the initial decision became "immediately effective" on that date (Ex. D). The Commission reserved the right to certify the record, on its own motion, for final decision before March 5, 1962, on which date the initial decision would become final.

and to the health and safety of the public" (Pet. for Review, pp. 4–6).

On May 8, 1962, the motion for stay was denied (Pet. 11). The Philadelphia Electric Company (which had been granted leave to appear as a party in the judicial proceeding) and the respondents, Atomic Energy Commission and the United States, filed motions to dismiss the proceeding on the ground that petitioner was not a "party aggrieved" or a "person suffering legal wrong * * * or adversely affected or aggrieved" as required by the statutes authorizing judicial review of administrative action and therefore lacked standing to seek review of the administrative determination. In a memorandum filed at oral argument in the court of appeals, petitioner set forth additional reasons why his petition for review should be granted, alleging that since he resided within 70 miles of the proposed construction site, his health and safety would be impaired by any unforeseen accident.

The court of appeals granted the motions to dismiss on the ground of lack of jurisdiction (Pet. 12).

ARGUMENT

The final orders of the Atomic Energy Commission are subject "to judicial review in the manner prescribed in sections 1031–1042 of Title 5, and to the provisions of section 1009 of Title 5" (42 U.S.C. 2239(b)). The statutory provisions referred to confer standing to obtain judicial review on "any party aggrieved by a final order," 5 U.S.C. 1034, and on "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within

the meaning of any relevant statute," 5 U.S.C. 1009(a). Petitioner, who has characterized his relationship to the administrative action as that of a "member of the public" (Pet. 6), does not have the requisite standing and therefore the court of appeals properly determined that it lacked jurisdiction to review at his request.

Petitioner has not suffered a "legal wrong" as comprehended by Section 10(a) of the Administrative Procedure Act. It is well settled that a citizen and taxpayer, absent any direct or threatened impact on his rights and alleging only a general wrong inflicted on him as a member of the general public, has no standing to attack governmental action. *Alabama Power Company* v. *Ickes,* 302 U.S. 464; *Massachusetts* v. *Mellon,* 262 U.S. 447. Furthermore, although the statutes authorizing judicial review at the behest of a "person aggrieved" have substantially enlarged the number of persons entitled to challenge administrative action,[4] this Court has stressed repeatedly that the injury giving rise to the grievance must be direct and substantial. Thus, in *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 422, the Court, in holding that CBS was a person "adversely affected" by the Federal Communications Commis-

[4] Compare *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (private power companies lack standing to enjoin governmental competition), with *Federal Communications Commission* v. *Sanders Bros Radio Station*, 309 U.S. 470 (existing station licensee is "adversely affected" by grant of license to a competitor within the meaning of a statute conferring standing to seek judicial review of agency action on a person adversely affected by the agency action).

sion's chain broadcasting regulations, pointed out that although the challenged regulations were not directed at the appellant and did not compel or prohibit action by it, "the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations." In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477, the Court conceded that although economic or financial injury to a competitor would not be a proper issue before the administrative agency, this would be a "sufficient interest" to confer standing to review the agency action on one injured in this manner. It has never been suggested that one whose only relationship to the subject of the administrative action was that of a citizen and a taxpayer has the direct and substantial interest necessary to obtain review of an administrative action. Moreover, a "naked assertion" of a grievance is insufficient: factual allegations detailing the nature of the appellant's interest affected by the administrative action are necessary. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. 2d 729, 731 (C.A. 3), certiorari denied, 349 U.S. 945. Petitioner's general allegations are insufficient to meet this standard. See also *Lynchburg Gas Co.* v. *Federal Power Commission*, 284 F. 2d 756 (C.A. 3); *United States Cane Sugar Refiners Ass'n.* v. *McNutt*, 138 F. 2d 116 (C.A. 2).

Contrary to petitioner's assertion, *International Union of Electrical, R. & M. Workers* v. *United States*, 280 F. 2d 645 (C.A.D.C.), reversed on other grounds, 367 U.S. 396, is not in conflict with the de-

cision of the court below and petitioner's reliance on it is misplaced. There, the court of appeals held that the petitioners, labor unions, were "persons aggrieved" by the grant of a construction permit by the Atomic Energy Commission for a nuclear reactor. The unions, which had intervened and became parties in the proceedings before the Commission, claimed that the grant of a construction permit for an allegedly unsafe reactor would depress the value of their real estate in the area and impair the value of collective bargaining contracts. The court held that because of the threatened economic injury to the unions they were persons "aggrieved," and entitled to judicial review, citing this Court's opinion in the *Sanders* case (280 F. 2d 645, 646).

In none of petitioner's allegations, which changed content at every stage of the proceedings, can there be found a claim of a similarly direct personal interest in the outcome of the proceedings. Petitioner's statement at the public hearing held by the Atomic Energy Commission dealt solely with the alleged "give away" of atomic energy technology and similar broad arguments addressed to the general administration of the Atomic Energy Act. In the telegram to the Commission seeking review of their order granting the construction permit petitioner asserted in general terms that he wished to present testimony regarding the "health and safety of the public" in addition to "certain constitutional questions." In the petition for review in the court of appeals, petitioner did not allege any aggrievement but elaborated on the general constitutional and economic policy issues (see pp. 5–6,

supra) and merely repeated *in haec verba* the assertion that the agency action was inimical to the "health and safety of the public." At oral argument, petitioner belatedly asserted that residence within 70 miles of a nuclear reactor would be detrimental to his health and safety in case of accidents.[5] The court's ruling upon this tardy and tenuous allegation of a grievance, without any supporting facts, presents no question warranting review by this Court.

CONCLUSION

The order of dismissal is clearly correct and presents no substantial question. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] In his petition for certiorari, petitioner is identified as residing within 70 miles of the site of the proposed reactor but the relationship which this bears to the question of his standing to attack the Commission's action is only vaguely referred to as "living within the area affected as to health and safety by the grant of the permit." (Pet. 3, 6).

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